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Federal Communications Commission
Office of the Secretary

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ORIGINAL

January 5, 2011

EX PARTE OR LATE FILED

VIA HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: ***In the Matter of Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink Application for Transfer of Control Under § 214 of the Communications Act, as Amended,*** **WC Dkt. No. 10-110**

Dear Ms. Dortch:

Pursuant to the *Protective Order* in the above-referenced proceeding,[1] please find enclosed for filing two copies of the redacted version of an ex parte letter from tw telecom inc.

Also pursuant to the *Protective Order*, one original of the confidential version of this filing is being filed with the Secretary's Office under separate cover today. Two copies of the confidential version will be provided to Gary Remondino of the Wireline Competition Bureau under separate cover.

Please do not hesitate to contact me if you have any questions or concerns about this submission.

[1] *See Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink Application for Transfer of Control Under § 214 of the Communications Act, as Amended*, Protective Order, 25 FCC Rcd 5963 (2010) ("*Protective Order*").

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Respectfully submitted,

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VIA HAND DELIVERY **_EX PARTE_**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: ***Applications Filed by Qwest Communications International Inc. and CenturyTel Inc., d/b/a/ CenturyLink, for Assignment or Transfer of Control,* WC Docket No. 10-110**

Dear Ms. Dortch:

As tw telecom inc. ("TWTC") and others have explained in the record in the above-referenced proceeding, CenturyLink's proposed acquisition of Qwest poses a serious threat to competition in the Merged Company's combined incumbent LEC territory. In particular, as TWTC has explained in a joint filing with other competitors,

> CenturyLink's insufficient expertise and experience [as a wholesale provider], the risk that key Qwest employees will leave, the Merged Company's increased incentive (due to an increased footprint and pressures to increase revenues and achieve synergies) and increased opportunity (due to fewer benchmarks) to deny, delay and degrade wholesale inputs all add up to serious problems for competition and consumer welfare.[1]

While CenturyLink has touted its settlement agreement with Integra Telecom[2] as a sufficient means to address these problems, this is not the case. The *Integra Settlement* (understandably) addressed Integra's concerns, which focused primarily on the need to ensure that the Merged Company would not deny, delay, degrade or discriminate in the provision of UNEs. But for companies like

[1] *Ex Parte* Presentation at 1, attached to Letter of Thomas Jones, Counsel, tw telecom *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 10-110 (filed Sept. 24, 2010); *see also, e.g.*, Comments of Access Point, Inc. *et al.*, WC Dkt. No. 10-110, at 23-31 (filed July 12, 2010); Comments of Cox Communications and Charter Communications, WC Dkt. No. 10-110, at 7 (filed July 12, 2010); Comments of Sprint Nextel Corporation, WC Dkt. No. 10-110, at 3-4 (filed July 12, 2010); Comments of COMPTEL, WC Dkt. No. 10-110, at 3-5 (filed July 12, 2010).

[2] *See generally* Integra Settlement Agreement, attached to Letter of Karen Brinkmann, Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 10-110 (filed Nov. 8, 2010) ("*Integra Settlement*").

TWTC that rely primarily on special access as a means of obtaining last-mile facilities in the legacy Qwest and CenturyLink incumbent LEC territories, the *Integra Settlement* is insufficient to address the harms posed by the proposed merger. **[***BEGIN CONFIDENTIAL***]**

[*END CONFIDENTIAL***]** As a result, TWTC asks that the Commission address these issues, along with the issues already addressed in the *Integra Settlement*, by imposing conditions on the Merged Company in this proceeding.

1. CenturyLink's Proposed Acquisition Of Qwest Poses A Serious Risk To Competitors That Rely On Special Access And Internet Backbone Traffic Exchange As Well As To Such Competitors' Customers.

If CenturyLink's proposed acquisition of Qwest is consummated, the Merged Company will have the opportunity to act on its increased incentive to harm competitors in numerous ways. For example, the Merged Company could reduce the quality and increase the price of special access services provided to its competitors like TWTC, and it could increase the price for the exchange of Internet backbone traffic. Such conduct would be extremely harmful to consumer welfare.

First, TWTC's business in Qwest's region is dependant upon Qwest maintaining its current level of special access performance. End users purchasing retail service from competitors are often unaware of the underlying carrier providing the network facilities. Therefore, end users often blame the competitor for poor service quality resulting from substandard special access provisioning. As TWTC has explained, poor wholesale performance can result in "(1) a CLEC paying a penalty to its own retail customers for failing to meet its contractual performance commitments and/or (2) the customer dropping the CLEC's service entirely."[3] Indeed, the customer may decide to shift its retail relationship to the very entity (the incumbent LEC) that was responsible for the CLEC's poor service.

Prior to the proposed acquisition by CenturyLink, Qwest has provided TWTC with the best special access wholesale performance and the most detailed special access performance reporting of any RBOC or large incumbent LEC with which TWTC does business.[4] Qwest's level of performance was in part the result of constant contact and collaboration over the course of many years between TWTC's and Qwest's network engineers to improve and maintain performance where possible.[5] In contrast, "CenturyLink's wholesale special access performance is poor, and CenturyLink has not demonstrated an interest in improving the level of service performance or customer service that it

[3] Comments of tw telecom *et al.,* WC Dkt. No. 10-110, at 60 (filed July 12, 2010) ("TWTC Comments").

[4] *See id.* at 39.

[5] *See id.*

provides" to TWTC.[6] CenturyLink provides special access performance reports only for the legacy Embarq territory, not for the legacy CenturyTel territory, "[d]espite tw telecom's repeated requests" for such reports.[7] Moreover, based on the Commission's 2009 ARMIS data, CenturyLink's special access performance is far worse than that of Qwest.[8]

As TWTC has explained, the Merged Company will likely have an increased incentive and opportunity to engage in discriminatory conduct in the provision of inputs to competitors.[9] It follows that there is a significant risk that the Merged Company's special access performance will be consistent with that of legacy CenturyLink, not legacy Qwest.[10] This risk is compounded by TWTC's, and likely other competitors', increasing reliance on incumbent LEC last-mile facilities. Such increasing reliance is the result of multi-location customers' demand that their service provider serve all of their locations, many of which can only be economically served by incumbent LEC last-mile facilities. This trend is especially strong where customers seek packetized services such as Ethernet because a customer benefits more fully from the efficiencies of such services where the services reach all of the customer's locations. Thus, just at the time when the Merged Company's incentive and ability to degrade service quality will likely increase as a result of the proposed transaction, competitors' reliance on the Merged Company's last-mile facilities is increasing.

Second, there is a threat that the Merged Company will use special access volume/term contracts as a means of harming TWTC and other competitors that rely on special access. In fact, since the announcement of the proposed transaction, Qwest appears to have already begun using its control over last-mile facilities to weaken competitors' ability to compete with the Merged Company in the future.

TWTC, like many other competitors operating in the legacy Qwest incumbent LEC region, purchases special access services under volume/term discount arrangements. Qwest's monthly tariffed special access rates are extraordinarily high. Accordingly, TWTC has agreed to a four-year commitment called the Regional Commitment Program ("RCP"). Under TWTC's existing RCP, which was available to new and renewing customers from February 1, 2006 until May 31, 2010, TWTC receives a 22 percent discount off of Qwest's monthly rates for DS1 and DS3 special access

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[6] *Id.*

[7] *Id.* at 41.

[8] *See id.* at 40-41.

[9] *See id.* at 49-61 (explaining that the significant increase in the Merged Company's footprint will increase its incentive to discriminate against competitors).

[10] TWTC's experience in the legacy BellSouth territory after BellSouth was acquired by AT&T illustrates this problem. As TWTC has explained, legacy BellSouth's excellent special access performance and the quality of the metrics provided to competitors declined following its merger with AT&T. *See id.* at 58-61.

services.[11] This "legacy RCP" permits customers to elect to "stabilize" their rates for the duration of the plan.[12] Rate stabilization essentially means that increases in the Qwest monthly tariffed rates do not apply during the life of the RCP. TWTC chose this option because, shortly before opting into the legacy RCP, Qwest had substantially increased its DS1 and DS3 special access rates, and TWTC needed protection from further rate increases.

Even under the discount and rate stabilization offered by the RCP, Qwest's special access rates are extremely high. **[***BEGIN CONFIDENTIAL***]**

[*END CONFIDENTIAL***]**

The RCP contains several requirements that are harmful to competition and consumer welfare. To begin with, in order to receive the discount and rate stabilization offered by Qwest under the legacy RCP, TWTC must ensure that at least 90 percent of its DS1 and DS3 special access circuits in service with Qwest at the beginning of the plan remain in service with Qwest during the 48-month duration of the plan.[14] If TWTC's purchases fall below 90 percent, it incurs a penalty equal to the cost of the additional special access circuits necessary to meet the 90 percent commitment.[15] The volume

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[11] *See* Qwest Tariff FCC No. 1, § 7.99.13(A)(1). The Qwest "legacy" RCP can be found at Qwest Tariff FCC No. 1 §§ 7.99.13 *et seq.*, while the "new" RCP can be found at Qwest Tariff FCC No. 1 §§ 7.1.3 *et seq.*

[12] *See* Qwest Tariff FCC No. 1, § 7.99.13(A)(1).

[13] **[***BEGIN CONFIDENTIAL***]**

[*END CONFIDENTIAL***]**

[14] *See infra* n.19.

[15] Qwest Tariff FCC No. 1, § 7.1.3(B)(3)(c) (new RCP) ("For each month the eligible monthly recurring revenue falls below the commitment level, the customer will be charged a shortfall on their next month's billing. The shortfall will be the difference between the commitment amount and the actual monthly recurring revenue."); *id.* § 7.99.13(A)(3)(c) (legacy RCP) ("For each month the in-service circuits fall below the commitment level, the customer will be charged a shortfall on their next month's billing.").

commitment "ratchets up" on an annual basis, thereby capturing any increased TWTC special access spending with Qwest.[16] For example, if TWTC had 100 DS1 special access circuits in service at the time it signed the RCP, it was required to maintain 90 DS1 special access circuits in service during the first year of the plan. If TWTC increased its purchases to 200 DS1 special access circuits in service with Qwest by the end of the first year of the plan, it would have been required to maintain 180 circuits in service (90 percent of 200) throughout the second year of the plan. This ratcheting mechanism coupled with the 90 percent commitment level limits the extent to which special access customers like TWTC can utilize third-party special access circuits or replace Qwest-provided circuits with self-deployed facilities.[17]

Unfortunately, after the announcement of the proposed transaction, Qwest adopted several changes to the RCP that make it even more harmful to competition and consumer welfare. Under the new RCP (which is the only RCP available for new or renewing customers after June 1, 2010), customers must maintain *95 percent* of their commitment with Qwest throughout the 48-month term of the plan.[18] This higher commitment is subject to the same upward ratcheting that applies under the legacy RCP. As a result, under the new RCP, it will be even more difficult for carriers like TWTC to rely on competitive special access service wholesalers, or to increase self-deployment.

In addition to the increased volume commitment, the new RCP commitment also measures a customer's volume commitment on a revenue basis, instead of on a circuit basis as was the case under the legacy RCP. This change has significant, harmful consequences. Consider, for example, a special

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[16] The plan also allows for a monthly option. *Id.* § 7.1.3(B)(4) (new RCP) ("If customer selects the monthly option, the Company will automatically increase the monthly recurring revenue commitment level each month that the monthly recurring revenue for in service circuits increases[.] If customer selects the annual option..., [a]t the time of the annual review, the commitment level will be changed by the company to reflect 95% of the current monthly recurring revenue for in-service DS1/DS3 circuits[.]"); *id.* § 7.99.13(A)(4)(a) (legacy RCP) (same except "circuits" substituted for "revenues" and "90%" for "95%").

[17] While the customer may decrease its commitment level, doing so will also trigger termination or shortfall liability. *Id.* § 7.1.3(B)(5)(a) (new RCP) ("A decrease in the commitment level before the expiration date will also result in the application of the Termination Liability."); *id.* § 7.99.13(A)(5)(a) (legacy RCP) (same). There is a real risk that carriers will incur shortfall liability. **[***BEGIN CONFIDENTIAL***]**

[*END CONFIDENTIAL***]**

[18] *Id.* § 7.1.3(B)(1) (new RCP) ("For DS1 Service, a customer must commit to a minimum of 95% of the monthly recurring revenue of their total Company-provided in-service DS1 Service circuits provided under Sections 7 and 17 of this Tariff within the Company's 14-state region. For DS3 Service, a customer must also commit to a minimum of 95% of the monthly recurring revenue of their total Company-provided in service DS3 Service circuits provided under Sections 7 and 17 of this Tariff within the Company's 14-state region.").

access circuit originally purchased by TWTC from Qwest as a combined DS3 channel termination and DS3 transport facility. When purchased, this combined circuit would count as a single DS3 for purposes of the legacy RCP commitment. If TWTC were to replace the transport component with a transport facility purchased from a non-incumbent LEC wholesaler, TWTC would still have a DS3 channel termination in place. Under the legacy RCP volume commitment, a DS3 channel termination/transport combination and a stand-alone DS3 channel termination both count as a single DS3 circuit.[19] As a result, TWTC would be able to replace Qwest's special access transport with a more efficient alternative without losing the benefit of the RCP discount, thereby encouraging competition at least in the provision of transport. Now consider the same scenario under the revenue-based commitment included in the new RCP. If TWTC replaces the transport component of the channel termination/transport DS3 circuit, the price of the circuit will decline because TWTC will no longer pay Qwest for the transport component. Because the value of the stand-alone channel termination circuit is lower than the value of the combined channel termination/transport circuit, it will be harder for TWTC to meet the new RCP commitment.[20] TWTC and other special access purchasers will therefore be less likely to replace Qwest special access transport with more efficient alternatives under the new RCP. In other words, changing to a revenue-based approach discourages carriers from investing in their own networks or from utilizing third-party special access services.

While the new RCP thus contains more onerous requirements, it includes no countervailing benefits. The discount percentage (22 percent) off of the standard, monthly rates is the same under the new RCP as was the case under the legacy RCP, and Qwest has not reduced any of its standard, monthly special access rates. Thus, the new RCP is simply a more aggressive form of exclusionary conduct than the (already exclusionary) legacy RCP. This is precisely the kind of conduct one would expect from a firm that stands to capture more of the benefits from weaker competitors across a larger incumbent LEC network footprint that the proposed transaction will create.

The Applicants will likely argue that the provisions of a particular volume/term tariff do not show an increased exercise of market power because customers voluntarily agree to purchase service under such tariffs. But this is simply not the case. The RCP is the only comprehensive, non-

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[19] *Id.* § 7.99.13(A)(1) (legacy RCP) ("A circuit is identified as a point-to-point connection and may consist of a Channel Termination, Channel Termination and Transport Channel or Transport Channel only."); *id.* § 7.99.13(A)(3)(a) ("RCP is established by committing a minimum of 90% of the customer's aggregate Company-provided in-service DS1 circuits, and/or their aggregate Company-provided in-service DS3 circuits for a term of 48 months. The commitment level of 90% applies to all in-service DS1/DS3 circuits. The actual quantity will be adjusted monthly or annually to reflect 90% of the current Company-provided in-service circuits except as specified in 4., following.").

[20] *Id.* § 7.1.3 (B)(3)(a) (new RCP) ("RCP is established by committing a minimum of 95% of the monthly recurring revenue for a customer's aggregate Company-provided in-service DS1 circuits, and/or their aggregate Company-provided in-service DS3 circuits for a term of 48 months. The commitment level of 95% applies to all in-service DS1/DS3 circuits. The actual revenue commitment will be adjusted monthly or annually to reflect 95% of the current monthly recurring revenue for Company-provided in-service circuits except as specified in 4., following.").

negotiated DS1 and DS3 discount plan available to Qwest's customers, and, as explained, **[***BEGIN CONFIDENTIAL***]**

[*END CONFIDENTIAL***]**. Moreover, it is simply not economically feasible for any competitor to pay Qwest's undiscounted monthly rates. Therefore, TWTC has little choice but to agree to purchase special access pursuant to the new RCP plan **[***BEGIN CONFIDENTIAL***]**

[*END CONFIDENTIAL***]**[21]

The threat of more onerous and exclusionary terms in the RCP is compounded by the possibility that the Merged Company will seek to further increase TWTC's costs by exploiting **[***BEGIN CONFIDENTIAL***]**

[*END CONFIDENTIAL***]**

In sum, the threats of declining service quality and more exclusionary volume/term agreement conditions combined with TWTC's increased reliance on incumbent LEC last-mile facilities do not bode well for competition and consumer welfare in the Merged Company's incumbent LEC territory. It seems entirely possible, even likely, that the Merged Company will use its stranglehold over last-mile connections to business customer locations to degrade the quality of TWTC's services, increase TWTC's costs and stunt the development of a wholesale market for special access services. These outcomes will hurt competition and, more importantly, business customers throughout the Merged Company's incumbent LEC territory.

Third, there is a significant threat that the Merged Company would act on its incentive to raise rivals' costs by increasing the cost of exchanging Internet backbone traffic. Indeed, the additional traffic generated from CenturyLink and the addition of CenturyLink's end users to Qwest's Tier 1 network will increase the Merged Company's market power over rival backbone providers. The Merged Company may very well seek to utilize this market power by increasing the prices legacy

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[21] As TWTC has explained in the special access rulemaking proceeding, escalating volume commitment plans such as the RCP harm competition when used by carriers with market power like Qwest. *See, e.g.,* Letter of Thomas Jones, Counsel, tw telecom, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 8-10 (filed June 14, 2010).

Qwest charged for exchanging Internet backbone traffic. It could do so by, for example, **[***BEGIN CONFIDENTIAL***]**

[*END CONFIDENTIAL***]**

2. The Integra Settlement Does Not Adequately Address The Threat That The Merger Poses To The Special Access And Internet Backbone Markets.

While the private agreements reached between CenturyLink and various interested parties (in particular, the *Integra Settlement* and subsequently announced settlements that are based on the *Integra Settlement*)[22] are a good first step in addressing the harms associated with the proposed transaction, these agreements do not address some of the most significant harms posed by the proposed merger. Most importantly, from TWTC's perspective, those settlements do not adequately address special access or the exchange Internet backbone traffic.

The lion's share of the conditions in the *Integra Settlement* focuses on UNE-related pricing and performance. For example, while the settlement establishes detailed conditions to ensure that the Merged Company will "meet or exceed" the average UNE performance for three years in the legacy Qwest incumbent LEC service areas, this condition appears not to apply to special access.[23] CenturyLink also agreed not to "reduce or modify" the state UNE performance plans (*i.e.*, the Qwest Performance Assurance Plan (QPAP)) for 18 months and agreed not to "eliminate or withdraw" the QPAP for at least three years.[24] If the Merged Company falls short of its performance goals, it also must conduct a "root cause" analysis and remedy the situation within 30 days.[25] If the Merged Company cannot resolve the matter, the competitive carrier may bring the issue before the state commission.[26] While TWTC believes that these requirements are entirely justified and that they should be adopted by the FCC as merger conditions, they do not address special access. In fact, the *Integra Settlement* does not include any comparable provisions governing special access service quality.

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[22] *See e.g.,* Letter of William E. Cheek, President, Wholesale Operations, CenturyLink, to Jennifer Hightower, VP, Regulatory Affairs, Cox, *et al.*, at 2 (filed Nov. 19, 2010), attached to Letter of Karen Brinkmann, Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 10-110 (filed Nov. 22, 2010) (memorializing Cox-CenturyLink agreement and stating that, among other things "Cox agrees that the terms set forth in the Integra Settlement entered into on November 6, 2010 and attached hereto satisfactorily resolves the issues of Cox in Arizona and Nebraska").

[23] *Integra Settlement* § 2(a)(i).

[24] *Id.* § 2(a).

[25] *Id.* § 2(b).

[26] *Id.* § 2(b)(ii).

Even with respect to those sections of the *Integra Settlement* which contain conditions covering both UNE and special access services, the UNE-related conditions remain in place for a longer time period than the special access-related conditions. For example, under the *Integra Settlement*, the Merged Company may not terminate or grandparent, change the terms or conditions of, or increase the rates in any "Extended Agreements" subject to specific timelines which vary based on the nature of the Extended Agreement (*e.g.*, interconnection agreement ("ICA") vs. special access tariff). Under the *Integra Settlement*, competitors may extend current ICAs, even those in evergreen status, for 36 months following closing.[27] A separate condition explicitly states that UNE rates may not increase for 36 months.[28] By contrast, the rates and terms in "commercial agreements" (*e.g.*, agreements for commercially available UNE replacement services) and "wholesale agreements" (*e.g.*, non-tariffed special access services such as those services subject to forbearance from dominant carrier regulation) are subject to change within 18 months of closing.[29] The settlement provides the least protection to tariffed special access service agreements (including contract tariffs and RCP plans), the terms of which are subject to change within only 12 months of closing.[30]

Furthermore, the *Integra Settlement* does not include any commitment that the Merged Company will maintain the arrangements for the exchange of Internet backbone traffic that currently apply to legacy CenturyLink and Qwest. From TWTC's perspective, this is an important and dangerous gap in the *Integra Settlement.*

3. The Commission Should Adopt Merger Conditions That Sufficiently Address Special Access And the Exchange Of Internet Backbone Traffic.

While, as stated, the Integra settlement is a good starting point for FCC conditions associated with the proposed transaction, the FCC should supplement the terms of the Integra settlement with conditions that fully address the threat to special access and Internet backbone traffic exchange posed by the transaction. Accordingly, in addition to adopting the terms of the Integra settlement as merger conditions, the Commission should condition its approval of the proposed transaction on the Merged Company's agreement to do the following:

- Extend the duration of all commitments applicable to special access in the Integra settlement to at least equal the duration of comparable commitments applicable to UNEs;

- For at least 36 months from the close of the transaction, continue to (1) provide special access performance reports with the same level of detail and frequency that Qwest

[27] *Id.* § 3(a).

[28] *Id.* § 4(a).

[29] *Id.* §§ (3)(b)-(c).

[30] *Id.* § 3(d).

provided prior to the merger, (2) for each of the metrics in those reports, meet or exceed the performance levels that Qwest provided prior to the announcement of the merger, and (3) conduct monthly special access performance meetings with requesting carriers to review performance results and consider initiatives for continuous improvement;

- For at least 36 months from the close of the transaction, permit special access customers to maintain their current arrangements for the purchase of special access services, including the legacy RCP and any existing overlay contract that provides a discount on prices yielded by the RCP; and

- For at least 36 months from the close of the transaction, permit competitors to maintain existing arrangements, **[***BEGIN CONFIDENTIAL***]** **[***END CONFIDENTIAL***]** for the exchange of Internet backbone traffic.

4. The Adoption Of Special Access and Internet Backbone Conditions Described Herein Is Consistent With Commission Precedent.

The conditions proposed herein are consistent with past FCC precedent. In previous RBOC merger orders, the duration of conditions related to special access and Internet backbones in many cases equaled or exceeded the duration of the conditions related to UNEs. For example, in the *AT&T/BellSouth Merger Order*, the FCC imposed detailed conditions regarding the pricing and performance of special access services, most of which lasted 48 months, while the conditions related to UNEs lasted only 42 months.[31] In the Bell-IXC mergers, the conditions related to both special access and Internet backbone services lasted longer than the conditions related to UNEs.[32] In the

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[31] *Compare AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, App. F at 147 (2007) ("*AT&T/BellSouth Merger Order*") (stating that "unless otherwise expressly stated to the contrary, all conditions and commitments...would apply...for a period of forty-two months from the Merger Closing Date") *with id.* at 150 ("Each of the following special access commitments shall remain in effect until 48 months from the Merger Closing Date."). The FCC subsequently changed the terms and shortened the duration of one of the special access conditions, Condition 6, from 48 to 39 months. *See AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Order on Reconsideration, 22 FCC Rcd 6285 (2007).

[32] *See Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control,* Memorandum Opinion and Order, 20 FCC Rcd 18433, App. G at 128-130 (2005) ("*Verizon/MCI Merger Order*") (setting UNE-related conditions at 24 months and the conditions related to special access and Internet backbone services at 30 and 36 months, respectively); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, Appendix F at 122-125 (2005) ("*SBC/AT&T Merger Order*") (same).

Frontier/Verizon Merger Order, the FCC extended all ICAs, tariffs and "other existing wholesale arrangements" for 36 months following closing.[33]

Moreover, the special access conditions adopted in previous merger orders often included robust conditions designed to prevent a decline in special access performance after the merger. Specifically, in prior incumbent LEC merger orders, including the recent *CenturyLink/Embarq Merger Order*, the FCC adopted specific conditions and benchmarks to address the danger that special access performance would decline following the merger.[34]

Finally, the Commission has also consistently adopted merger conditions deemed necessary to prevent the merged company from increasing the price of exchanging Internet backbone traffic. For example, in the *SBC/AT&T*, *Verizon/MCI* and *AT&T/BellSouth Merger Orders*, the merging parties were required to maintain the same number of settlement-free peering arrangements before and after the mergers.[35] All of those mergers, like the one in this case, involved the combination of a Tier 1 peer with a non-Tier 1 peer that had a substantial number of end-user customers.[36] In accordance with that

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[33] *Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, Memorandum Opinion and Order, 25 FCC Rcd 5972, App. C at 36 (2010) ("*Frontier/Verizon Merger Order*"); *see also id.* at 30 ("Unless otherwise specified herein, these commitments will expire three years from the Transaction Closing Date.").

[34] *See Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8741, App. C at 27-28 (2009) (requiring the merged company to "maintain service levels for the Embarq operating companies that are comparable to those Embarq wholesale customers experienced pre-merger," maintain specified service metrics for all CLEC services, "maintain [for those metrics] a comparison of actual quarterly results to a benchmark value to be set at the 12-month average results achieved from April 1, 2008 through March 31, 2009," and "maintain service at a level that is no less than one standard deviation from the benchmark value, 90 percent of the time").

[35] *See AT&T/BellSouth Merger Order*, App. F at 155; *SBC/AT&T Merger Order* at App. F at 124; *Verizon/MCI Merger Order*, App. G at 130.

[36] At the time of the Verizon-MCI merger, MCI was a Tier 1 Internet backbone provider ("IBP"), while Verizon was not; however, Verizon had a large number of end users. *See Verizon/MCI Merger Order*, ¶¶ 124-25 (listing MCI as a Tier 1 provider, but noting that "[t]he merger does not remove an existing Tier 1 provider, as Verizon is not a Tier 1 IBP"). Yet, even though Verizon was not a Tier 1 provider, the FCC imposed Internet backbone conditions on its approval of Verizon's merger with MCI. *Id.*, App. G at 130 ("For a period of three years . . . Verizon/MCI will maintain at least as many settlement free U.S. peering arrangements for Internet backbone services with domestic operating entities as they did in combination on the Merger Closing Date. . . .); *id.* ("[F]or two years thereafter, Verizon/MCI will post its Internet backbone peering policy . . . on a publicly accessible website. . . ."). The same was true of both the SBC-AT&T merger and the AT&T-BellSouth merger -- in each, one Tier 1 IBP merged with a non-Tier 1 IBP with a significant number of end users, and the FCC in both instances imposed Internet backbone conditions. *See SBC/AT&T Merger Order*, ¶ 124 & App. F

precedent, the FCC should condition the transaction on the Merged Company's requirement to maintain the same number of settlement-free peering arrangements for at least 36 months.

Respectfully submitted,

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(noting that AT&T was a Tier 1 IBP but SBC "does not appear to have yet attained that status," and applying the same conditions as it did in the Verizon-MCI merger); *see also AT&T/BellSouth Merger Order*, ¶¶ 139, 141 & App. F (finding that AT&T was a Tier 1 IBP and BellSouth was not, and applying a similar Internet backbone condition).